

**MINUTES**

**MONTANA SENATE  
56th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN LORENTS GROSFIELD**, on February 18, 1999 at 9:03 A.M., in Room 325 Capitol.

**ROLL CALL**

**Members Present:**

Sen. Lorents Grosfield, Chairman (R)  
Sen. Al Bishop, Vice Chairman (R)  
Sen. Sue Bartlett (D)  
Sen. Steve Doherty (D)  
Sen. Duane Grimes (R)  
Sen. Mike Halligan (D)  
Sen. Ric Holden (R)  
Sen. Reiny Jabs (R)  
Sen. Walter McNutt (R)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Judy Keintz, Committee Secretary  
Valencia Lane, Legislative Branch

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB 443, SB 472, SB 481, SB 503, 2/16/1999  
Executive Action: SB 443, SB 456, SB 481, SB 486

**HEARING ON SB 443**

**Sponsor:** **SEN. MIKE HALLIGAN, SD 34, Missoula**

**Proponents:** **Chief Justice Jean Turnage, Montana Supreme Court  
Justice Karla Gray, Montana Supreme Court  
John Connor, Attorney General's Office  
William Hooks, Chief Appellate Defender**

**Al Smith, Montana Trial Lawyers Association**  
**Don Judge, AFL-CIO**  
**Rebecca Moog, Montana Womens Lobby**

**Opponents:**       None

**Opening Statement by Sponsor:**

**SEN. MIKE HALLIGAN, SD 34, Missoula,** introduced SB 443, which was introduced on behalf of the Supreme Court. He explained that the Intermediate Appellate Court judges would be appointed by the Governor to a staggered term and be required to run for election when their term expired. This would consist of 1) a two-year term, 2) a four-year term, 3) a six-year term, or 4) an eight year term.

**Proponents' Testimony:**

**Chief Justice Jean Turnage, Montana Supreme Court,** explained that the Intermediate Appellate Court would oversee all cases with exception of cases involving the death penalty, life sentences, or the constitutionality of a statute. They looked at various models and it appeared that the Nebraska model was the most efficient. They are very interested in reducing the case load on the Supreme Court which would enable the Court to spend more time and render opinions on the more significant cases.

***{Tape : 1; Side : A; Approx. Time Counter : 9.10}***

**Justice Karla Gray, Montana Supreme Court,** presented her written testimony, **EXHIBIT(jus40a01)**.

**John Connor, Attorney General's Office,** rose in support of Senate Bill 443. He maintained that this bill would allow the Court to devote the time and effort to establish quality opinions on significant cases.

**William Hooks, Chief Appellate Defender,** related that his office represents indigent defendants who appeal to the Supreme Court. The cases he handles include death penalty and Constitutional issues. The Court must review these cases in their entirety, regardless of the merit of the case.

**Al Smith, Montana Trial Lawyers Association,** maintained that this bill will benefit the people of the State of Montana. With the increased case load at the Supreme Court, it is difficult for Montana citizens to get through the legal system in a timely manner.

**{Tape : 2; Side : A; Approx. Time Counter : 9.27}**

**Don Judge, AFL-CIO**, remarked that they support this bill with some hesitancy. Regarding workers compensation appeals, this would be a court appointed by a governor who would appoint the very individuals to oppose their repeated attempts to deny access and to limit the benefits of that system. However, the appointment would be brief and becomes an election in the year 2000. They decided to support this legislation because it is the very court that they worked to elect that is working to set up this appellate court. They are fair, hardworking and honest. Their call for more time to provide better justice to the cases that come before the court, is an important call. When justice is delayed, justice is denied. If justice is too expeditious to give fair hearing and concern, then justice is denied on that end as well.

**Rebecca Moog, Montana Womens Lobby**, rose in support of SB 443.

**Opponents' Testimony:** None

**{Tape : 2; Side : A; Approx. Time Counter : 9.30}**

**Questions from Committee Members and Responses:**

**SEN. JABS** questioned whether everyone could appeal to the Supreme Court after a district court ruling. **Mr. Connor** responded that in criminal cases, everyone has the right of appeal. He believes that is the case with civil appeals as well.

**SEN. JABS** remarked that one wonders why someone would bother going to the district court if they were to end up in the Supreme Court anyway. **Mr. Connor** remarked that there needed to be a record for the Supreme Court to review. The factual record is established in the district court. The Supreme Court reviews the application of the law to that particular case and whether the legal decisions made were appropriate.

**SEN. MCNUTT** questioned whether many of the appeals in the appellate court would then be appealed to the Supreme Court. **Mr. Connor** explained that the bill authorizes the establishment of rules in that regard. He believed that fewer cases would be appealed due to an appellate resolution of an issue.

**CHAIRMAN GROSFIELD** commented that he has had lawyers tell him that it is almost malpractice if they do not appeal a case. **Chief Justice Turnage** responded that this may have been true in the past, but is not evident today. A losing party in the intermediate court would not have an absolute right of appeal.

They would have a right to petition the Supreme Court. This is called a petition for certiorari. The Court makes the decision as to whether or not to accept that appeal. The Court would consider whether there would be any precedential or Constitutional merit in the appeal that may have been overlooked. Most of these petitions would not be successful.

**CHAIRMAN GROSFIELD** questioned whether all Supreme Court Justices would be involved in reviewing each petition and also what amount of time the review would take. **Chief Justice Turnage** explained that the review of the petition would be expedited and it would take a shorter time than the full appeal. Under the present Constitutional provision, it takes four justices to decide any issue. Internal operating rules would need to be adopted. A panel of three justices could report to the full Court. The result of that report would require four Justices to decide.

**SEN. MCNUTT** questioned whether the appellate mediation requirement could be expanded to address the need for an intermediate court system. **Chief Justice Turnage** explained that the mandatory mediation process under Rule 54 was spearheaded by **Justice Gray**. It now covers all civil members. The criminal matters do not go to mediation and it may not be appropriate to require a criminal matter to go to a mediation panel. Every civil proceeding needs to pass through Rule 54. If the parties do not agree on mediation, the appeal must move forward otherwise there would be a serious problem with the Constitutional right to access to the courts.

**SEN. BARTLETT** asked how many law clerks were assigned to each justice. **Chief Justice Turnage** clarified that each justice has two law clerks.

**CHAIRMAN GROSFIELD** remarked that the Committee had a hearing a week ago on a death penalty moratorium bill. This morning, another death penalty bill will be heard. He questioned the amount of time death penalty cases would take on an annual basis. If the death penalty was eliminated, would this have an impact on the workload of the Court. **Justice Gray** responded that they have received a flurry of death penalty appeals. These cases are real time burners. She wrote a death penalty opinion last year which took the better part of three months. She worked on this opinion in addition to the other responsibilities of her office. These cases have extraordinarily large records. The transcripts are several thousand pages long. All the issues raised must be given the time they require because this addresses the ultimate sanction.

**CHAIRMAN GROSFIELD** added that the legislature has been tough on crime in recent years in response to the people's desires. This has caused a huge budget for the Department of Corrections. Another impact is to the court system. He asked for information regarding how this aspect changed the workload at the Court.

**Justice Gray** explained that when DUI penalties were increased to a felony penalty on a fourth and subsequent offense, a significant number of appeals followed. People feel a need to challenge felony convictions. Laws of unintended consequences come into play in criminal appeals.

**Closing by Sponsor:**

**SEN. HALLIGAN** remarked that the court is looking for quality work on the cases in front of them. The Nebraska model is the most efficient model available that allowed for the immediate appellate court to be available to anyone wanting to appeal. It also provides a screening process so the Supreme Court can deal with the most important issues.

***{Tape : 2; Side : A; Approx. Time Counter : 9.52}***

**HEARING ON SB 481**

**Sponsor:**           **SEN. FRED THOMAS, SD 31, Stevensville**

**Proponents:**     **Mike McLean, Juvenile Probation Officer, Missoula County**  
                      **Sandy Oitzinger, Montana Juvenile Probation Officers Association**

**Opponents:**       **None**

**Opening Statement by Sponsor:**

**SEN. FRED THOMAS, SD 31, Stevensville,** introduced SB 481 which defines the term "juvenile home arrest officer" and allows for that officer to take a youth into custody upon violation of a placement order under the home arrest program.

***{Tape : 2; Side : A; Approx. Time Counter : 9.55}***

**Proponents' Testimony:**

**Mike McLean, Juvenile Probation Officer, Missoula County,** explained that juvenile probation officers (JPO) have the authority to arrest a juvenile who is in violation of probation. The home arrest program includes officers who are not probation officers and do not have the same duties by statute. Their

responsibility is to supervise juveniles who have been placed in custody in their parent's home, or wherever they are living, in lieu of the cost of placing them in secured detention facilities. The youth has entered into a specific contract. If the contract is violated, that youth needs to be taken into custody and placed in detention pending a hearing before a judge. There are many situations where the home arrest officer observes a specific violation and needs the authority to take that youth into custody.

**Sandy Oitzinger, Montana Juvenile Probation Officers Association,** rose in support of SB 481.

**Opponents' Testimony:** None

**Questions from Committee Members and Responses:**

**CHAIRMAN GROSFIELD** remarked that the definition of home arrest officer did not speak to qualifications of that officer. **Mr. McLean** explained that in Missoula those individuals are selected and appointed by the judge. The court has numerous applicants and all of these people would hold a college degree.

**CHAIRMAN GROSFIELD** questioned the requirements for a probation officer. **Mr. McLean** clarified that a Chief Probation Officer must have a masters degree in behavioral science and one year of related work experience or a bachelors degree and three years of related work. The qualifications of a deputy juvenile probation officer are to approximate those of the Chief Probation Officer but are not mandated as such.

**CHAIRMAN GROSFIELD** raised a concern about the lack of qualification for a home arrest officer in the legislation. **Mr. Connor** remarked that he has been involved in the process of selecting probation officers who are appointed by the court to fill the official functions. The court has always made a priority of finding high quality individuals.

**SEN. JABS** asked whether smaller counties must appoint these officers. **Mr. McLean** explained that this program is available statewide and no counties are required to have these officers. In Missoula, this is funded by a grant from the Board of Crime Control to help alleviate the high cost of juvenile detention.

**Closing by Sponsor:**

**SEN. THOMAS** remarked that this is an economical program and also a better way of handling youth in a county of any size.

*{Tape : 2; Side : B; Approx. Time Counter : 10.13}*

**HEARING ON SB 472**

**Sponsor:** SEN. JACK WELLS, SD , Bozeman

**Proponents:** Bill Fleiner, Montana Sheriffs and Peace Officers Association and Chairman of the Tactical Advisory Committee, the Tactical Advisory Committee  
Gary Marbut, Montana Shooting Sports Association, Western Montana Fish and Game Association, and The Big Sky Practical Shooting Club  
John Mercer, Montana Shooting Sports Association

**Opponents:** Betty Waddell, Montana Association of Churches

**Opening Statement by Sponsor:**

SEN. JACK WELLS, SD 14, Bozeman, introduced SB 472 which amends the laws pertaining to machine guns and silencers. It is not unlawful to own a 50 caliber machine gun in Montana if it is properly registered under federal requirements.

This bill is supported by law enforcement in the state. There are a number of law enforcement agencies who are technically in violation of Montana law because they have weapons that meet federal law but do not meet Montana law.

Montana law is antiquated. In §45-8-307, the law was written during prohibition since there are references back to 1935. The language regarding machine guns covers machine guns other than one adapted for use of pistol cartridges of 30 caliber and larger. This referred to the old tommy gun that used pistol cartridges.

In this bill, the definition of machine gun eliminates the word "semiautomatic". A semiautomatic does not use a single function. The trigger needs to be pulled each time the weapon is fired. Many of the sporting weapons in Montana being used by sportsmen, collectors, and law enforcement individuals are semiautomatic but are technically not machine guns.

The second portion of the bill addresses using pistol ammunition and includes the definition of machine gun. The bill would allow that a person would not be prohibited from owning the same but would need to apply to the federal authorities, obtain a special

permit, have a strict background check, pay a \$200 fee for each weapon, etc.

Section 3 contained language not applicable in Montana law and conflicting with the federal law. This language has been stricken.

Section 4 addresses silencers. There hasn't been a silencer used in a crime in Montana. There are cases where law enforcement personnel have suppressers on their weapons. Also, collectors and sportsmen would like to use suppressors. When teaching someone to shoot, a suppressor on the weapon helps the student from flinching at the sound of the weapon. Many people have trouble learning to shoot due to the loud report from the weapon.

***{Tape : 2; Side : B; Approx. Time Counter : 10.20}***

**Proponents' Testimony:**

**Bill Fleiner, Montana Sheriffs and Peace Officers Association and Chairman of the Tactical Advisory Committee**, remarked that the **Tactical Advisory Committee** is a coordinating group of local, state, and federal law enforcement as well as support agencies. They have developed a manual which has received national recognition. They recommend that on page 2, line 7, the language read "possession of a silencer that is not registered under federal law". This would be consistent with HB 566. The weapons they use should be in conformity with federal law. They have had to use automatic weapons largely in order to keep up with the individuals they confront.

**Gary Marbut, Montana Shooting Sports Association, Western Montana Fish and Game Association, and The Big Sky Practical Shooting Club**, remarked that Montana's laws regarding machine guns and silencers are antiquated. They were an attempt to deal with the gangsters of the prohibition era. The bill leaves in place the Montana law that states that it is illegal to commit a crime with a machine gun or a silencer. The language being removed is the language which makes it illegal for the law enforcement agencies in Montana to have tactical teams. Approximately one-third of the law enforcement agencies have tactical teams with these firearms.

**John Mercer, Montana Shooting Sports Association**, explained that in teaching firearms instruction, the most detrimental characteristic of shooting is the noise.

***{Tape : 2; Side : B; Approx. Time Counter : 10.28}***



**Opponents' Testimony:**

**Betty Waddell, Montana Association of Churches**, commented that they are concerned about the violence in this state. They support moderate and reasoned regulation of firearms. In 1991, there were 144 deaths in Montana caused by a gun. From 1991 to 1995, there was a 200% increase in the permits for concealed weapons in Montana. While handguns were used in the murders of 13 people in Australia, 33 in Britain, 36 in Sweden, 60 in Japan, 128 in Canada, during 1992 13,220 persons were murdered by handguns in the United States.

*{Tape : 2; Side : B; Approx. Time Counter : 10.30}*

**Questions from Committee Members and Responses:**

**SEN. DOHERTY** raised a concern that the bill would repeal sections of §45-8-305 which speaks to a presumption of an offensive or aggressive purpose. One of the presumptions in that section is an individual who has been convicted of a crime of violence in any court of record in either state or federal court who is in the possession of a machine gun, has an offensive or aggressive purpose. He questioned why the **Montana Sheriffs and Peace Officers Association** would want to repeal that section of the law. **Mr. Fleiner** explained that he briefly reviewed the repealers and would not have a problem if this language remained in the law. This statute would be applicable to their needs.

**SEN. DOHERTY** remarked that the law could be amended simply to address possession of these types of weapons by law enforcement personnel. **Mr. Fleiner** did not see a problem with that suggestion. Tactical teams respond to other cities and counties providing mutual aid. He is more concerned by the liability involved than he is by the overzealous prosecution of not following state statute.

**CHAIRMAN GROSFIELD** asked how many machine guns were registered in the state. **Mike Batista, Department of Justice**, explained that there are 33 machine gun owners registered with the department. The owners are private individuals.

**CHAIRMAN GROSFIELD** asked if the department would have access to the federal database. **Mr. Batista** responded that they would and since the federal agencies registered machine gun owners, this is a duplication.

**CHAIRMAN GROSFIELD** stated that another section being repealed is Section 308 which addresses keeping a register of manufactures of machine guns. He questioned if there were any manufacturers in Montana. **Mr. Batista** stated that he was not aware of any. He added that this is another registration requirement by federal agencies.

*{Tape : 2; Side : B; Approx. Time Counter : 10.37}*

**Closing by Sponsor:**

**SEN. WELLS** agreed with the amendment making the language on silencers consistent with the House bill. The opponent who addressed the number of deaths in this country referred to deaths caused by handguns. This bill does not address handguns. As many deaths that have been caused by firearms in any particular year, the amount would be five to six times for the amount of firearms that saved lives by the proper use of guns. He would not like to see an amendment that only law enforcement personnel be able to own machine guns. There are 33 registered private owners of these weapons in Montana.

*{Tape : 2; Side : B; Approx. Time Counter : 10.40}*

**HEARING ON SB 503**

**Sponsor:** **SEN. JON ELLINGSON, SD 33, Missoula**

**Proponents:** **James T. Ranney, Citizen**  
**Michael Donahoe, Attorney**  
**Bill Hooks, Montana Appellate Defender Office**  
**Betty Waddell, Montana Association of Churches**  
**Christine Kaufman, Montana Human Rights Network**  
**Al Smith, Citizen**  
**Arlette Randash, Citizen**  
**Scott Crichton, American Civil Liberties Union**  
**Sharon Hoff, Montana Catholic Conference**

**Opponents:** **John Connor, Attorney General's Office and**  
**The Montana Attorneys Association**

**Opening Statement by Sponsor:**

**SEN. JON ELLINGSON, SD 33, Missoula,** introduced SB 503 which would establish a procedure for the trial jury to participate with the trial judge in determining when the death sentence is appropriately imposed. This bill establishes a procedure for involving the jury in this process. Only three states impose the

responsibility for issuing a death sentence upon the judge alone. These states are Montana, Arizona, and Idaho. Thirty-five other states permit the death penalty but all of them require the participation of more than one person in making the final decision. Twenty-nine states give the responsibility to the jury, four states provide for a panel of judges, and four states permit juries to make a recommendation to the judge. The current law provides that the Supreme Court may not substitute its judgment for that of the sentencing court in assessing the credibility of witnesses; drawing inferences from testimonial, physical, documentary, or other evidence; or resolving conflicts in the evidence presented at the sentencing hearing or considered by the sentencing judge. The heaviest burden in imposing the death sentence remains upon the judge.

Only by allowing a jury to participate in this process, do we directly consider the sediments of the public as represented by the jury in each case.

**Proponents' Testimony:**

**James T. Ranney, Citizen,** commented that this bill is more fair in that it brings to bear the conscious of the community. By interposing a right to a jury trial, fewer death sentences would be imposed. He worked on the case of Vern Kills-On-Top. He talked to every juror he could and each juror told him they had no intention of imposing a death sentence on this defendant who was one of the two Kills-On-Top brothers. His client, Vern Kills-On-Top did not kill anyone according to the prosecution's evidence. He was in a bar, 12 miles away when his brother committed the crime. In Montana, a single judge imposed the death penalty. If the state was earnest in its claim that they wanted the procedure to be as fair as possible, they would be in favor of this bill. This procedure is more fair. It will avoid the risk of litigation.

***{Tape : 3; Side : A; Approx. Time Counter : 10.47}***

**Michael Donahoe, Attorney,** commented that he was Terry Langford's lawyer and was present at his execution. The current structure of law in Montana is that the jury shall not be involved in the imposition of sentence. In capital cases, the rule is a little different. For an ordinary felony case in state court, the lawyer would not be able to question the prospective jury panel concerning the possible penalty. In capital cases, the lawyer is permitted, by statute, to discuss with the prospective jury members, the applicability of the death penalty. By subjecting potential jury members to questioning concerning their views on

the death penalty, people who have a persuasion against the death penalty are eliminated from the jury.

In 1958, the U.S. Supreme Court decided a case called Trump v. Dulles which has a test called the evolving standards of decency test. The Court has referred back to this test on many occasions.

In 1972, approximately 77,000 people voted against capital punishment when the new Montana Constitution was enacted. Currently the Attorney General has a committee that considers on which case the death penalty should be requested. The jury panel should be able to disagree with that decision. The broad range of life experience that may be obtained from 12 members of the public will make the balance more equitable. This will involve a more fair representation in whether or not the death penalty is imposed.

**Bill Hooks, Montana Appellate Defender Office**, remarked that he is involved in death penalty cases in the post-conviction phase. Thirty-five of the thirty-eight states that have a death penalty put this decision in the hands of a collective body, either the jury, a panel of judges, or a jury advisory recommendation to a judge.

**Betty Waddell, Montana Association of Churches**, commented that Senate Bill 503 would provide a more just system in what is ultimately an immoral sentence.

**Christine Kaufman, Montana Human Rights Network**, stated that their organization stands against the death penalty in all applications. They support this bill because they believe it will result in fewer death sentences being carried out in this state. They are particularly concerned that the death sentence is applied against the poor, racial minorities, and men.

**Al Smith, Citizen**, remarked that the jury which heard the evidence and convicted a person should be the ones to decide the sentence. If juries decide death penalty sentences, there will be a partial moratorium on death sentences. Juries are representatives of their communities.

**Arlette Randash, Citizen**, reported that testimony was given on another death penalty bill which held that we do not execute people who live in our communities. This is an irreversible decision. If we make a mistake, there is nothing we can do to overcome it. She added that **Justice Sheehy** has stated that when we are purging the jury of anyone who is opposed to the death penalty at the onset, we should let the jury be involved in the

decision on sentencing. In a capital crime when Cain killed Abel, after God found out about this he banned Cain from the community. Cain told God that he would be killed out in the dessert. God told him it would not happen because he was to be marked and if any person touched him, God would take seven fold vengeance on that person.

**Scott Crichton, American Civil Liberties Union**, presented his written testimony, **EXHIBIT(jus40a02)**.

**Sharon Hoff, Montana Catholic Conference**, rose in support of SB 503.

*{Tape : 3; Side : A; Approx. Time Counter : 11.05}*

**Opponents' Testimony:**

**John Connor, Attorney General's Office** representing the **Department of Justice** and the **Montana Attorneys Association**, remarked that he does not speak as an advocate of the death penalty. Regarding the case of Bernard Fitzpatrick, the 9<sup>th</sup> Circuit Court of Appeals held that they had to retry Mr. Fitzpatrick in six months or let him go. They were ready for trial and struck an arrangement with the defendant where he pled guilty and received a sentence of 300 years, no parole. The public sentiment was so strongly in favor of the death penalty, even though the case was 15 years old, that they were receiving encouragement to release him on his own recognizance in the Billings-Hardin area and there would be no need to retry the case. He can't imagine a jury not wanting to give Mr. Fitzpatrick the death penalty.

They have a committee review whether a death penalty sentence is appropriate. They spend a considerable time discouraging prosecutors from seeking the death penalty when it is not legally appropriate or not something the evidence would support.

In Montana there are six inmates on death row: David Dawson, Ronald Allen Smith, Douglas Turner, William Gallahan, Dan Johnson, and Rodney Satler. All cases are in stages of litigation. They all live in the maximum security building at the state prison. They are all entitled to the same kinds of custody changes that the prison has implemented which make it possible for persons to earn benefits and privileges.

Mr. Smith has been on death row the longest. In 1992, he pled guilty to killing two Native American men. He stated that one of the reasons he killed them was because he wanted to see what it was like to kill someone. His direct appeal was affirmed in

1996. He filed a post-conviction petition in November of 1998 which is pending.

Mr. Dawson was tried for homicide in Billings in April, 1986. His conviction was affirmed in 1988. He filed a federal habeas corpus petition in October, 1989 which was stayed pending the resolution of state court issues. He filed a post-conviction petition, which was denied in February of 1996 and is currently on appeal to the Montana Supreme Court.

Mr. Turner pled guilty to three homicides in Dawson County when he was 16 years old. This involved three neighbors that he didn't know. In September of 1990, while in prison, he and William Gallahan beat another man to death with baseball bats. His conviction was affirmed in October of 1993. He filed a post-conviction petition in October of 1995, which is pending. He was also convicted of five deliberate homicides resulting from the prison riot in September of 1991.

Mr. Gallahan was in prison, when he and Mr. Turner beat a man to death with baseball bats, for beating a woman to death with a baseball bat in Billings. His conviction was affirmed in 1993. He filed a federal habeas corpus petition in June of 1995, which is pending. He filed a state post-conviction petition in December of 1996, which is also pending. He was also convicted of five deliberate homicides as a result of the prison riot.

Mr. Satler was in prison for a Sanders County homicide. In 1995, he beat a man to death in the Lake County Jail with an exercise bicycle seat. He almost beat a woman to death at the boot camp. His appeal was affirmed in 1998. He has the right to file a post-conviction petition until August of 1999.

Mr. Johnson was in prison for a homicide in Havre. He and another man were involved in a homicide for hire. He beat a man to death in prison with a pitching horse shoe in 1995. He was tried in 1996. His appeal was affirmed in November of 1998 and he has the right to file post-conviction relief until August of 1999.

The Montana Supreme Court has overturned the sentences of Mr. Coleman, John Keif, and Vernon Kills-On-Top. Judge Miser, who had imposed the death penalty in two prior instances, did not do so in the Lester Kills-On-Top case.

These cases present gruesome, homicide-related situations. If a jury were involved, he does not believe they would have made different choices. The court labors at great length over these issues before it reaches the point over whether or not to impose a death penalty. Judge Mizner, who has imposed two death

penalties, is a compassionate and caring man who knows the law and tries to do the right thing. He reflects the community values because he is elected by the community.

Every time a jury is picked in a death penalty case, they are involved in a death qualification process. The people who do not believe in the death penalty, are eliminated from the panel. His consistent finding is that most jurors do not have a problem with the fact that the defendant could be given the death penalty. Perhaps they would have a problem if they had been the ones to impose the penalty.

Texas and California include the jury in this process. There are over 300 persons on death row in California. Of the six persons on death row in Montana, only two claim a Native American heritage and he did not know that when prosecuting the cases. All the others are Caucasians.

On page 1, lines 18-19 of the bill, the language states that the hearing for imposition of penalty shall be held within three days. This would provide the potential for contamination of the jury panel. This will be an issue on appeal.

All the cases he has been involved with include prison inmates who have killed before and then killed in the prison. In death penalty cases, the rule is to give the defense whatever it wants, withdraw instructions the defense doesn't like, try to make as few objections as you possibly can, and have very little input in the sentencing stage. He has concerns about whether or not a jury panel would be able to weigh these factors in mitigation.

The bill does not include any standards by which the judge would assess the recommendations made to him by the jury panel. Also, in a situation such as the Kills-On-Top case where the sentencing occurred 10 years after the conviction, there would be no way to bring the same panel back for a re-sentencing. They could not select a new panel and provide an abbreviated set of facts. The case may have to be tried again.

This proposal creates costly legal nightmares beyond those that already exist with the death penalty and will not discourage the imposition of the death penalty in these egregious cases. He suggested that either the death penalty be eliminated in its entirety or that the present system be left in place. A jury system should not be grafted onto a judge-designed system.

When the Supreme Court reviews death penalty issues on appeal, it is required to examine the issue of whether or not the sentence was imposed based upon undue passion or prejudice. Unless there

is a record of the jury deliberations, he does not know how that issue would be determined.

**{Tape : 3; Side : B; Approx. Time Counter : 11.29}**

**Questions from Committee Members and Responses:**

**SEN. HOLDEN** remarked that on page 1, lines 18-19, it appeared to him that there could be some mischief for delaying court action, etc. **Mr. Connor** responded that if the hearing is delayed beyond the time of conviction, this would be an opportunity for contamination to occur or allegations of contamination to be made.

**SEN. HOLDEN** questioned if the defense could appeal on the basis of the jury members following a conviction. **Mr. Connor** remarked that the defense may be able to ask the court to examine things that have gone on in the jury process such as undue or outside influence. As a prosecutor, he wants defense attorneys committed to doing the best job they can for defendants in death penalty cases.

**SEN. HOLDEN** remarked that his area of Montana highly supports a death penalty but the judge does not believe in the death penalty. The juries in this conservative area would probably support the death penalty.

**SEN. HALLIGAN** asked for a response to the issues raised by **Mr. Connor** in the situation of a reversal or new trial and trying to find the original panel of jurors as well as the situation with the findings and conclusions issue. **Mr. Ranney** explained this would work like any other case. Regarding a case that has been 10 years in the offing, the defense attorney would want to bring in new evidence as to how the person has adjusted in prison. Regarding the language on lines 18-19, he was told by the drafter that he consulted someone in the Attorney General's Office and that was the source of the language. He suggested that the sentence be amended out of the bill. Seventy percent of the other states have the jury provide the findings. He is not aware of any problem in those states. The federal government uses this system.

**CHAIRMAN GROSFIELD** questioned whether this bill might prompt litigation on the basis of treating cases differently in the future. Could the individuals on death row appeal that they were not afforded the same opportunity. **Ron Waterman, Attorney,** raised a concern that cleaning up the language in the death penalty statutes, would take out the fringe elements where the death penalty is susceptible to challenge. People who want to



push forward with death penalties are then given a cleaner, more bullet proof case. The current death row inmates already have an argument as to whether their Seventh Amendment rights to a jury trial were deprived because the sentencing function, with respect to a death penalty, was not passed upon by the jury. Sooner or later Montana will have to confront this. **Mr. Ranney** added that the states which involve the jury in the sentence of a death have modeled their statutes upon the model penal code. **Mr. Connor** maintained that the issue of whether or not the current system is constitutional has been addressed by the Montana Supreme Court on several occasions.

***{Tape : 3; Side : B; Approx. Time Counter : 11.50}***

**Closing by Sponsor:**

**SEN. ELLINGSON** summarized that this bill may cause situations where the death penalty would be inappropriately imposed. He believes juries take their responsibilities seriously. This would provide a check and balance upon the imposition of a death penalty. The judge and the jury must both agree that the death penalty should be imposed.

In regard to Section 5, page 3, defense and prosecuting counsel can provide appropriate jury instructions and questionnaires which can be used by the jurors. This will clearly demonstrate the jury's conclusions and what mitigating or aggravating circumstances were brought to bear upon the jury's conclusions.

Why should Montana be one of the three states in which the responsibility for issuing a death sentence should be placed upon one person alone, the judge? He raised a concern about the responsibility that was imposed upon one individual. When society sanctions the taking of the life of one of our citizens, we have committed the gravest, the most extreme, and the most solemn act of punishment. Doesn't it make sense to permit the conscience of the community, through the jury, to be brought to bear on this highly subjective judgment. Doesn't it make sense to share the burden of this responsibility between the trial judge and the jury in our effort to achieve the fairest of all possible results.

**SEN. DOHERTY** was excused from the meeting.

***{Tape : 3; Side : B; Approx. Time Counter : 12.00}***

**EXECUTIVE ACTION ON SB 486**

**SEN. HALLIGAN** provided testimony from several individuals who were not able to attend the hearing on SB 486 in favor of the legislation: **Douglas Harris, Missoula Attorney**, letter, **EXHIBIT(jus40a03)** **Leslie Halligan, Missoula Deputy County Attorney**, letter, **EXHIBIT(jus40a04)** and **Judith A. Loring, Stevensville Attorney**, letter, **EXHIBIT(jus40a05)**.

He added that he was concerned with the manner in which the bill addressed the evidence needed for a determination that a third party have a parental right. The amendments apply to these concerns.

**Ms. Lane** explained that the amendments eliminated redundancy in the language.

**Motion:** **SEN. HALLIGAN** moved that **SB 486 BE AMENDED - SB048601.av1, EXHIBIT(jus40a06)**.

**Discussion:**

**SEN. HALLIGAN** added that the amendments will give better direction on the evidence that the court needs to be able to make the finding. Section 2 contains this information.

**Vote:** **The motion carried unanimously - 8-0.**

**Motion:** **SEN. HALLIGAN MOVED THAT SB 486 DO PASS AS AMENDED.**

**SEN. GRIMES** remarked that when the natural parent is in absentia, it is necessary to address the situation of third party parenting. It may result in more legislation for fine tuning in the future. This is an exciting opportunity and he is pleased that this legislation is taking the lead in this area. He supports the bill with the caveat that it will be watched very carefully.

**SEN. HALLIGAN** withdrew his motion.

***{Tape : 4; Side : A; Approx. Time Counter : 12.04}***

**Motion/Vote:** **SEN. HALLIGAN** moved that **SB 486 BE AMENDED BY STRIKING THE WORDS "OR FAILING TO PROVIDE SUPPORT FOR A CHILD" ON PAGE 2, (4)**. **Motion carried unanimously - 8-0.**

**Motion:** **SEN. HALLIGAN** moved that **SB 486 DO PASS AS AMENDED.**

**Discussion:**

**SEN. GRIMES** asked for clarification of the fitness standard being removed from the original bill. **Ms. Lane** explained that the original bill referenced unfitness or abuse and neglect in an attempt to recognize that there are those situations in addition to the types of situations being addressed in this bill. She removed the references to unfitness or ability to parent because they are clearly covered in Title 41, Chapter 3, the abuse and neglect statutes.

**Vote:** Motion **carried unanimously - 8-0.**

#### **EXECUTIVE ACTION ON SB 443**

**SEN. JABS** claimed that if the intermediate appellate court would reduce the number of appeals, it would be a good deal.

**SEN. HALLIGAN** explained that the Constitution only requires that there be one appeal. Death penalty cases are different. The vast majority of the cases would go to the intermediate appellate court. A selected number of cases allowed a bypass to the Supreme Court. A case of first impression or involving the constitutionality of a statute would be times that a case could be appealed from a district court to the Supreme Court. Every other case would stay with the appellate court.

**SEN. MCNUTT** raised a concern that with an appellate court in place, appeals could still be made to the Supreme Court.

**SEN. GRIMES** conveyed that this would be a priority for funding should the funds become available.

**Motion:** **SEN. HALLIGAN** moved that **SB 443 BE AMENDED - SB044301.av1, EXHIBIT(jus40a07).**

#### **Discussion:**

**SEN. HALLIGAN** summarized that the amendment addressed that the appeal from the final decision of the workers' compensation judge must be filed with the appellate court or the Supreme Court of Montana in the manner provided for in the bill.

**Vote:** Motion **carried unanimously - 8-0.**

**Motion:** **SEN. HALLIGAN** moved that **SB 443 DO PASS AS AMENDED.**

#### **Discussion:**

**SEN. BISHOP** claimed that it was important that the judges were elected to include the initial panel.

**SEN. HALLIGAN** explained that it could not be accomplished if staggered terms were to be provided. The four judges appointed would run for 1) a two-year term, 2) a four-year term, 3) a six-year term, or 4) an eight-year term.

**CHAIRMAN GROSFIELD** clarified that the provisions for appointments are by the Judicial Nomination Commission, which is composed of seven members from around the state. All the judges would be proposed to the Governor from the PSC districts.

**SEN. HALLIGAN** maintained that the check and balance is the immediate election. In July of 1999, the appointment process would begin but the judges would need to run for election.

**Vote:** Motion **carried 7-1 with Holden voting no.**

**EXECUTIVE ACTION ON SB 481**

**Motion:** **SEN. HALLIGAN** moved that **SB 481 DO PASS.**

**Discussion:**

**SEN. HALLIGAN** claimed that the home arrest program works very well and is probably more effective in rural areas. It saves more money in the areas that do not have the detention facilities which the larger towns do have. The Board of Crime Control has grants for communities that want to keep the youth in the local area.

**Vote:** Motion **carried unanimously -8-0.**

**EXECUTIVE ACTION ON SB 456**

**Motion:** **SEN. HALLIGAN** moved that **SB 456 BE TABLED.**

**Discussion:**

**SEN. HALLIGAN** remarked that property managers do a good job for the landlords but representing them in court is far more difficult than people imagine. This involves more than landlord tenant laws and includes the Rules of Civil Procedure. He is willing to work with the association to address some of their concerns in the interim.

**Vote:** Motion **carried unanimously - 8-0.**

**ADJOURNMENT**

Adjournment: 12:33 P.M.

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SEN. LORENTS GROSFIELD, Chairman

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JUDY KEINTZ, Secretary

LG/JK

**EXHIBIT** (jus40aad)